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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 237

NICHOLAS ANGELERI,

Petitioner,

vs.

THE STATE OF NEW JERSEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

BRIEF IN OPPOSITION

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POINT I

Reference to Official Reports of Opinions Delivered in the Court Below

The opinion of the Supreme Court of New Jersey, the Court immediately below, which examined the judgment

of the County Court of Somerset County, Somerville, New Jersey, is officially reported at 51 N. J. 382, 241 A. 2d 3 (1968). The opinion of the County Court of Somerset, New Jersey, is unreported.

POINT II

Counter-Statement Concerning Jurisdiction

Petitioner seeks to invoke the jurisdiction of this Court under 28 U. S. C., sec. 1257.

We respectfully submit that the decisions of the Supreme Court of New Jersey in this case involving the question presented in the petition are in conformity with the provisions of the *Fifth* and *Fourteenth Amendments* of the *Federal Constitution* and that the said Court did not decide any constitutional question of substance in a manner contrary to the decisions of this Court.

We, therefore, respectfully submit that this Court should not entertain jurisdiction and issue a writ of *certiorari* to review the decision of the Court below.

POINT III

Counter-Statement of the Case

The respondent, the State of New Jersey, is basically in accord with the statement of the case as stated by the petitioner.

However, the respondent wishes to emphasize that the answer of the defendant to the State's request for Bill of Particulars regarding alibi pursuant to Rule 3:5-9 listed nothing other than the names and addresses of the witnesses who would be called on the defendant's behalf. The defendant did not list the places where he claimed to have been on the dates in question, notwithstanding the fact that the State requested such information (Petitioner's Appendix D16a).

In fact, the defendant did not call Tess and Al Newman, persons listed in defendant's answer, to testify regarding an alibi, and the State made no comment at the time of trial concerning the defendant's failure to call the aforesaid witnesses.

The defendant, in answering the State's Bill of Particulars, disclosed no facts with regard to the nature of his alibi. At the trial Mr. Rose, defendant's accountant, testified that the defendant was with him at the defendant's construction trailer on one of the days in question and that they were completing the defendant's Federal Income Tax Returns, in anticipation of the April 15th filing deadline and that the defendant remained with him for the entire day (D70a-1 to 9). Dr. Meyers, another of defendant's alibi witnesses, testified that the defendant was seen by him in his office on the date in question. None of this information was elicited from the defendant prior to trial in response to the State's Bill of Particulars.

The State did interview defendant's alibi witnesses prior to trial for the purpose of ascertaining whether, in fact, the defendant had a valid alibi.

On April 1, 1968, the New Jersey Supreme Court rendered its decision affirming the judgment of the County Court of Somerset County, Somerville, New Jersey, and upholding the constitutionality of the Rule 3:5-9 of the rules governing the New Jersey Courts (1968).

POINT IV

Summary of the Argument

The State respectfully submits that the Rule requiring a defendant, who wishes to rely on the defense of alibi, to supply to the prosecution on demand a Bill of Par-

ticulars, giving the places where the defendant claims to have been at the time of the offense and the names and addresses of the witnesses who will be called upon to establish such alibi, does not violate the petitioner's rights under the *Fifth* and *Fourteenth Amendments* to the *United States Constitution.*

POINT V

Reasons for Denying the Writ

Rule 3:5-9 of the Rules Governing the New Jersey Courts provides for a reciprocal exchange of information between the defendant and the State concerning a proposed alibi defense. It does not in any way authorize any form of testimony from the defendant, nor does it require the defendant to explain the factual nature of his alibi. In fact, the State is without process to compel the witnesses listed in defendant's answer to the Bill of Particulars to submit to an interview or disclose any information prior to trial. The investigation made by the State is entirely a voluntary one.

Rule 3:5-9 further imposes a mandatory requirement of a reciprocal exchange of information on the State; in that, upon demand from the defendant, the State is required to furnish the defendant with the names and addresses of witnesses upon whom the State intends to rely to establish the defendant's presence at the scene of the alleged offense.

It is apparent from the reading of Rule 3:5-9 that a reply to the State's demand for a Bill of Particulars with respect to alibi may not be used by the State in any way prior to the establishment by testimony of the defendant's witnesses listed therein of an alibi. If the defendant does not produce the witnesses listed therein,

the names furnished in reply to the State's Bill of Particulars cannot be used against him, and no inference may be drawn therefrom.

Consequently, the State contends that the information required of the defendant is not testimony, nor is it a compulsion causing the defendant "to be a witness against himself" within the meaning of the Fifth Amendment of the United States Constitution. The information required of the defendant is neither incriminating nor is it exculpatory. The Rule, for example, does not require the defendant to explain the nature of his alibi, *i.e.* what he was doing, what time he was there, or any other factual matters within the defendant's knowledge.

The State of New Jersey does not regard the defendant's alibi as an affirmative defense as distinguished from a general denial. *State* v. *Garvin,* 44 N. J. 268, 272 (1965); rather an alibi is simply a general denial of guilt. *State* v. *Petros,* 45 N. J. 540 (1965). The New Jersey Supreme Court has noted that the legislative purpose of the Rule was "to do away with existing unfairness in criminal trials of a surprise alibi and at the same time to give the defendant equivalent information as to the State's case." *State* v. *Baldwin,* 47 N. J. 379, 388 (1966).

It is significant that Rule 3:5-9 does not require or compel the defendant to take any affirmative act on his own defense. Rather, it states that if the defendant, on his own initiative, intends to take the affirmative act on his own defense of establishing an alibi, it must first be disclosed prior to trial; the obvious reason being to allow the State to conduct a reasonable investigation in order to determine whether, in fact, the defendant can establish an alibi.

It is quite conceivable that compliance with this Rule can result in a dismissal of charges against the defendant before trial if defendant's alibi is substantiated by the State's investigation following disclosure by the defendant.

If in the present case Rule 3:5-9 did not exist and the defendant produced alibi witnesses at the time of trial who, ostensibly, established the defendant's presence elsewhere at the commission of the offense, one of two situations would result.

The State would be compelled to proceed with the trial without first having the opportunity to investigate the factual circumstances of the alibi or the motive of the alibi witness. Such a compulsion is an open invitation for the commission of fraud and perjury. In the case at bar, it should be pointed out that Mr. Rose, one of defendant's alibi witnesses, was defendant's accountant, who had, since 1954, been involved in dealings with the defendant and who was paid annually by the defendant (D87a to D88a).

Dr. Meyers, who also testified as an alibi witness (D110a to D112a) resided at 125 Stelle Avenue, Plainfield, New Jersey, Appendix D, 16A. With this information the State was able to offer evidence to prove that the doctor's office was no more than fifteen minutes away from the scene of the crime; a point which was factually significant at the trial in that it tended to discredit the doctor's testimony of an alibi for the defendant at the *exact* time that the offense occurred.

Without this information the State in the two instances cited would not have been able to factually demonstrate that the defendant's alibi was unsubstantiated. Had the State only been apprised of the defendant's intention to call the alibi witnesses at the time of trial, the basic infirmity of the testimony could not have been es-

tablished, and the defendant might very well have convinced a jury of the truth of his alibi.

On the other hand if the State were to be afforded a reasonable opportunity to investigate the merits of the alibi witnesses' testimony following disclosure at the trial a lengthy adjournment of the trial would be necessitated. Such a ruling would utterly destroy the efficiency of the criminal court system, would result in criminal juries being sequestered over lengthy periods of time, and might, in fact, redound to the defendant's prejudice, since trial publicity could hardly be kept from the jurors during the course of the adjournment. In this event the jurors could become influenced by court rulings made outside of their presence and by publicity of matters excluded from evidence.

Chief Justice Weintraub in the New Jersey Supreme Court's decision cited in defendant's brief, Appendix A at page 7a, puts the basic problem quite clearly.

> "The Constitution does not protect a defendant from the consequences of the defense he makes nor assure him a right to defend as to deny the State a chance to check the truth of his position."

All of the cases cited in that opinion are in accord, and in fact, the defendant has not cited any cases to the contrary.

CONCLUSION

For the reasons here and before set forth, we respectfully submit that the petition for the writ of *certiorari* should be denied.

Respectfully submitted,

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